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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 838

CAROLINA & NORTHWESTERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, STATE UNIVERSITY RAILROAD COMPANY, AND SOUTHERN RAILWAY COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action to set aside an order of the Interstate Commerce Commission issued pursuant to Sections 1(4) and 15(6) of the

Interstate Commerce Act (49 U.S.C. 1(4), 15(6)). The challenged order prescribed a new basis for the division of joint rail rates on coal shipments originating on the lines of the Louisville and Nashville Railroad Company ("L. & N.") and terminating on the lines of the Southern Railroad Company ("Southern") or its subsidiaries at points in North and South Carolina and at Augusta, Georgia (J.S. 7a–8a).

All the coal traffic involved is transferred between the L. & N. and the Southern at Knoxville, Tennessee. The traffic was developed by the L. & N. through construction of branch lines to coal mines in eastern Kentucky and Tennessee. It uses these lines almost exclusively for the transportation of coal and delivers 80 percent of the coal originating there to connecting carriers (J.S. 10a). As the originating carrier, it furnishes all the freight cars used, with the Southern paying a flat per diem rental of $2.75 per car (J.S. 19a). Virtually all of these cars are returned empty by the Southern (J.S. 14a–15a).

The Knoxville gateway was opened in 1918 and, in accordance with then existing traffic patterns, a division of the joint rates was established by private agreement between the L. & N. and the Southern. The agreement divided the through rate by giving the L. & N. a flat amount per ton from a group of mines, plus or minus differentials for other groups of mines depending on their distance from the base group (J.S. 8a–9a). The balance of the shipper's payment went to the Southern.

L. & N. initiated negotiations to obtain an increased share of the rates on the ground that circumstances

had changed since the division was first made. When the negotiations failed, L. & N. filed a complaint with the Commission against the Southern alleging that the existing divisions were unjust and unreasonable, in violation of Sections 1(4) and 15(6) of the Interstate Commerce Act.

Following full administrative proceedings, the Commission found that changes in the movement of the coal traffic since 1918 now require the L. & N. to originate almost 99 percent of that traffic at more distant mining areas than in the past and result in the Southern making deliveries at less distant destinations (J.S. 12a).[1] The Commission found, as a result, that for a four-month period in 1958 the L. & N.'s total car costs were $178,043, while those of the Southern (based upon the $2.75 per diem) were $158,041 (J.S. 37a–39a). On the basis of these and other undisputed cost data, the Commission concluded that under the old divisional agreement the L. & N. received only 35.78 percent of the total revenues involved while absorbing some 47.64 percent of the costs of the movement (J.S. 24a, 28a). On the other hand, the Southern received 64.22 percent of the revenues while bearing only 52.36 percent of the costs (J.S. 24a, 28a). Finding that the old rate divisions did not afford the L. & N. sufficient revenues to recover its out-of-pocket costs (showing a

[1] For example, while there was practically no movement from the farthest mines in 1917, in 1957 more than 44 percent originated there. In the destination areas, 27 percent of the tonnage in 1917 moved to North Carolina and 73 percent to more distant points in South Carolina. In 1957, the situation was practically reversed, with 70 percent of the tonnage terminating in North Carolina and 30 percent in South Carolina.

deficit of $135,207 in 1958), while the Southern's share amounted to an excess over its costs of more than one million dollars, the Commission determined that new divisions should be prescribed pursuant to Section 15(6) (J.S. 32a).

Applying the standards of Section 15(6), the Commission found that "both the L. & N. and the Southern are generally being operated efficiently and that, as to the particular traffic and issues involved, neither should be considered as more or less efficient than the other," and that there are no "substantial differences between the parties as to the importance to the public of their respective transportation services" (J.S. 30a). The Commission concluded that all other relevant factors under Section 15(6) being equal, "[a]ny change in existing divisions must be based primarily on cost of service considerations" (J.S. 30a).

Since the Southern paid the L. & N. a flat rental of $2.75 per car per diem, its freight car costs were readily ascertainable and the only dispute over costs, insofar as is relevant here, arose with respect to computation of the L. & N.'s freight car costs in connection with the coal traffic at issue. Both parties submitted lengthy studies of those costs and presented expert witnesses in support of their respective claims. Since appellants' cost studies contained "basic deficiencies" (J.S. 27a), they were rejected. The Commission adopted, as the most accurate calculations available, those of the L. & N. Its car costs were stated in terms of reproduction value rather than original costs, and allocated maintenance, repair, and depreciation expenses solely on the basis of the time

the freight cars spent carrying the coal on the L. & N. and did not consider the mileage the cars traveled in this transportation.

Using the L. & N.'s cost figures, the Commission prescribed new divisions on the basis of "the relative fully distributed costs of the carriers" (J.S. 33a–34a; see J.S. 37a–40a). The new divisions should increase the L. & N.'s annual revenues by about $540,000 (J.S. 34a) and permit both carriers to recover approximately 95 percent of their fully distributed costs. By contrast, under the old divisions, the L. & N.'s revenues failed to meet those costs by about $688,000 while the Southern's share exceeded its costs by approximately $402,000 (J.S. 34a).

On review, the three-judge district court unanimously sustained the order of the Commission, holding that "appraisal of cost figures is itself a task for experts * * *. [W]e do not perceive it was inexpertly done, nor have we the power to substitute our fact appraisal for that of the Commission" (J.S. 3a–4a).

ARGUMENT

The Commission's order in this case, unanimously affirmed by the district court, complies with the direction of the Interstate Commerce Act that divisions of joint railroad rates be established on a just, reasonable, and equitable basis with no undue preference or prejudice as between participating carriers (Sections 1(4) and 15(6)). Appellants do not deny that marked changes in circumstances since 1918 have rendered the old method of division unjust to the L. & N.; and that new divisions should be prescribed

pursuant to Section 15(6) of the Act. Nor is any challenge made to the propriety of the Commission's conclusion that such a prescription in this case "must be based primarily on cost of service considerations." The objections which appellants do raise relate solely to the adequacy of the computation of only one of the many cost items, *i.e.*, comparative freight car costs (see J.S. 37a–39a) which were considered by the Commission in ordering the new divisions of rates. These factual questions have no substantial importance in the administration of the Interstate Commerce Act and do not warrant plenary consideration by this Court.[2]

1. Appellants contend primarily (J.S. 4–5, 15, 16–17, 19–20) that the Commission miscalculated the freight car costs of the L. & N. by utilizing a depreciation and return factor based upon current reproduction value rather than the original costs of the cars as reflected on the L. & N.'s books. As appellants apparently recognize (J.S. 21), in the usual rate division case each carrier normally supplies a share of the freight cars used in the through movement and it matters little in dividing revenues on the basis of cost of service whether depreciation is stated for all parties concerned in terms of replacement or original costs since these items will tend to cancel out each other. The present case is unusual, however, in that the L. & N. owns and supplies *all* of the freight cars used

[2] As the district court noted (J.S. 4a), "Southern has attempted to find questions of law where there are none. The Commission has acted neither capriciously nor arbitrarily nor has it misinterpreted or misapplied the law."

in the traffic involved while the Southern pays the L. & N. a flat rental of $2.75 per diem per car.[3] It would be unrealistic, in ascertaining the L. & N.'s actual current freight car costs, to use a depreciation figure based on original acquisition costs, even if such costs may be appropriate, as appellants note (J.S. 15, 21), for routine bookkeeping and tax purposes or even for the "traditional" rate division case. Thus, as both the hearing examiner (Recommended Report, pp. 14–15, 52–53) and the Commission (J.S. 14a) pointed out, the cost of replacement of the L. & N.'s coal cars at current prices would exceed the present book value of its entire fleet of some 60,000 freight cars.[4] The Commission therefore did not err in rejecting as inequitable, in determining present costs, the original expense to the L. & N. of its equipment, a figure giving "no consideration * * * [to] the owning road for the replacement of obsolete cars at current inflated prices" (Recommended Report, p. 52) [5] and not reflecting "actual freight car expenses

[3] These per diem payments are the same for all railroads and are based upon reproduction value, not original cost. See, *e.g.*, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291, 301.

[4] The Commission found that coal cars have a depreciable life of 30 years (J.S. 14a). The record shows that the current average per car cost for coal cars has increased more than 500 percent since 1920 (Exs. C–43a, C–28; Tr. 120, 354, 1357).

[5] The hearing examiner's lengthy findings as to relative costs (Recommended Report, pp. 32–54) were adopted by the Commission "in all material respects" (J.S. 24a). The Commission also made additional findings as to costs (J.S. 24a–28a, 37a–39a). There is no merit in appellants' argument (*e.g.*, J.S. 5) that no adequate findings were made sustaining the Commission's ultimate conclusions in this case.

and return on investment * * *" (*id.* at 53).

Contrary to appellants' assertions (J.S. 16–22), the objective of the Commission in utilizing reproduction value,[6] instead of original cost, was not to "equalize" the costs of the two carriers but to ascertain relative costs. Had equalization been its goal, it seems clear the Commission would not have rejected, as failing to reflect *actual* costs, the L. & N.'s first proposal that its car costs be computed on the assumption that it, like the Southern, had rented the coal cars for $2.75 per day rather than purchased them (see Recommended Report, pp. 52–53; J.S. 24a). The Commission's utilization, instead, of the much lower cost figure of $1.78 refutes appellants' contention (J.S. 12) that the Commission "grossly inflated" the L. & N.'s car costs to achieve equalization.[7]

2. Appellants also contend (J.S. 5, 13, 14, 17, 18–19) that the Commission's computations of the L. & N.'s

[6] The replacement factor employed by the Commission did not, in fact, allow the L. & N. 100 percent of current reproduction value but only approximately 67.6 percent of that value as of 1957 (see Ex. 257, Table 14). Allowance of full reproduction value would have substantially increased the L. & N.'s car cost figure of $1.78 per day as found by the Commission (see Ex. C–43a; Tr. 120, 354, 1357).

[7] Appellants contend that the Commission's reference to "comparable * * * costs" and the desirability of placing the parties on an "equal footing" (J.S. 25a) establishes their claim of equalization. As indicated above, however, it is perfectly clear that the Commission was referring to the necessity of ascertaining the *actual* relative costs of the two carriers as accurately as possible, without "special handicap or advantage favoring one carrier over the other" (J.S. 31a).

car costs were further distorted when it allocated repair, maintenance, and depreciation expenses solely on the basis of time, with no portion of these expenses being ascribed to actual use or mileage. However, appellants submitted no cost studies of the L. & N. based on time-use and reproduction cost. Since the Commission properly rejected, as we have seen, figures based on original cost, it correctly declined to use appellant's studies which, without separation, employed time-use and original cost (see J.S. 27a). Moreover, it appears that allocation of freight car costs on a time-mileage basis would not have substantially altered the computation of L. & N.'s costs. One of L. & N.'s studies which followed time-mileage would have reduced its total costs of more than $600,000 by only $20,398 (see Recommended Report, p. 48). The Commission, in these circumstances, properly followed the administratively more appropriate method of allocating all the repair, maintenance, and depreciation expenses entirely on the basis of the time which the freight cars spent in carrying the coal on L. & N.'s lines.

3. Finally, there is no merit to appellants' argument (J.S. 4–5, 14, 15, 17, 20–22) that the L. & N.'s car costs should have been reduced by deducting from them the difference between Southern's per diem payment of $2.75 per car while L. & N.'s cars were on Southern's tracks and the L. & N.'s per day car cost of $1.78 (or $0.97 per car per day) (J.S. 21–22). This argument confuses two wholly unrelated subjects, namely, *freight* revenues and *rental* revenues. Section 15(6) of the Act, as it applies here, deals with rate

divisions on the basis of the carriers' respective costs and revenues in providing *"the service of transportation"* (emphasis added). 49 U.S.C. 15(6). The L. & N. participates in a "transportation service" only between the coal mines and Knoxville. Beyond the interchange point on the Southern's lines, L. & N. is merely renting its facilities to another railroad. Whether the L. & N. made or lost money on the rental transaction does not affect L. & N.'s costs in providing "the service of transportation" on its own lines.

Moreover, appellants' argument is based on the assumption that the record shows that the Southern's per diem payments yield a net profit to the L. & N. But the only profits from per diem payments shown in this case relate to the L. & N.'s "entire fleet of all types of freight cars and results from its rental payments to, and rental income from, all its connecting railroads" J.S. 49a–50a). Appellants attempted no showing, and the record does not otherwise reflect, that *any* net credit accrues to the L. & N. from its car rentals to the Southern in connection with the coal traffic here in question.

CONCLUSION

The Commission's appraisal of the cost figures in this case represents a careful and reasonable effort to solve a complicated problem in transportation economics—one which, "unlike a problem in calculus, cannot be proved right or wrong." *New York* v. *United States,* 331 U.S. 284, 328. Its rulings on each of the above issues were within the realm of admin-

istrative expertise. The case presents no substantial question which would warrant a second review. We respectfully submit that the judgment below should be affirmed.

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